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# State v. Gould Appellant's Brief Dckt. 44493

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 44493
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR-FE-2007-1313
v.	)	
	)	
BRANDON GRANT GOULD,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE JASON D. SCOTT**  
District Judge

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**ERIC D. FREDERICKSEN**  
State Appellate Public Defender  
State of Idaho  
I.S.B. #6555

**REED P. ANDERSON**  
Deputy State Appellate Public Defender  
I.S.B. #9307  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEY FOR  
PLAINTIFF-RESPONDENT**

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## STATEMENT OF THE CASE

### Nature of the Case

After a jury trial, Brandon Grant Gould was found guilty of lewd conduct with a minor child under the age of sixteen. He subsequently filed three motions for correction of an illegal sentence pursuant to Idaho Criminal Rule 35 (*hereinafter*, Rule 35). Those motions were denied by the district court. Thereafter, he filed a motion for reconsideration, which the district court also denied. Mindful of the applicable authority holding that an illegal sentence must be clear from the face of the judgment and erroneous jury instructions do not impact subject matter jurisdiction, he asserts that the district court erred when it denied his motion for reconsideration.

### Statement of the Facts and Course of Proceedings

In October of 2007, Mr. Gould was charged by indictment with one count of lewd conduct with a minor child under the age of sixteen and one count of sexual abuse of a child. (R., p.51.) After a jury trial, Mr. Gould was acquitted of Count II (the sexual abuse charge) but found guilty of Count I. (R., p.51.) In October of 2008, the district court sentenced Mr. Gould to ten years, with three years fixed. (R., p.89.) In November of 2013, Mr. Gould filed a motion to correct an illegal sentence pursuant to Idaho Criminal Rule 35(a) (*hereinafter*, Rule 35(a) motion). (R., p.52.) The district court denied that motion in March of 2014. (R., p.52.) Mr. Gould appealed, but the Idaho Court of Appeals affirmed the district court's decision. (R., p.52.) In February of 2016, Mr. Gould filed a second Rule 35(a) motion. (R., pp.16-24.) The district court denied that motion in March of 2016. (R., pp.51-54.)

In July of 2016, Mr. Gould filed a third Rule 35(a) motion in which he argued that the prosecutor introduced evidence at trial, and through the jury instructions, that constructively amended the indictment as to Count II and therefore deprived the district court of subject matter jurisdiction. (R., pp.56-64.) The district court denied the motion. (R., pp.78-81.) It held that even if Count II had been constructively amended at trial

Gould has not shown grounds for relief under Rule 35(a). This is so for two reasons. First, Gould lacks a tenable basis for his contention that the alleged constructive amendment deprived the Court of subject-matter jurisdiction over the charges. The supposed charging defect is not one that would qualify as jurisdictional under the analysis the Idaho Court of Appeals undertook the first time Gould challenged his sentence as illegal. See *Gould*, 2015 WL 995141, at \*1-2.<sup>1</sup> Second, relief from an illegal sentence is authorized under Rule 35(a) only if the sentence's illegality can be discerned without resolving significant questions of fact or holding an evidentiary hearing. *E.g.*, *State v. Wolfe*, 158 Idaho 55, 65, 343 P.3d 497, 607 (2015). Gould's argument is that the trial proceedings were infirm as to Count II, prejudicing him in defending against Count I. Whether the alleged defects in the trial proceedings as to Count II actually prejudiced Gould as to Count I is a significant question of fact. Thus, it is not a proper subject for a Rule 35(a) motion.

(R., p.80.)

In August of 2016, Mr. Gould filed a motion for reconsideration of the district court's order on his third Rule 35(a) motion. (R., pp.83-88.) In that motion, he stated that he understood the district court was relying on *State v. Wolfe*, 158 Idaho 55 (2015), but argued that "the court only gives vague and ambiguous references to that case in support of its decision." (R., p.83.) He also argued that he raised the issue of subject matter jurisdiction in his initial Rule 35(a) motion but "it was never fully and fairly litigated on its merits." (R., p.84.) He argued that the district court did not hold that *res judicata*

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<sup>1</sup> In Docket No. 42051, the Court of Appeals held that Mr. Gould's claim that the absence of the names of the testifying witnesses on the indictment was not a jurisdictional defect.

applied to his situation. (R., pp.83-84.) Citing to *State v. Flegel*, 151 Idaho 525 (2011) and *State v. Lute*, 150 Idaho 837 (2011), he also argued that an amended indictment was a jurisdictional defect, and such an issue could be raised through a Rule 35(a) motion. (R., pp.85-86.) Finally, he argued that “the evidence that the jury instructions amended the indictment are (sic) clear from the face of the record. One only need to read the jury instruction on Count II of the indictment as compared to the indictment itself.” (R., p.86.)

Relying on its prior order,<sup>2</sup> the district court denied the motion for reconsideration. (R., pp.89-90.) Mr. Gould then filed a notice of appeal that was timely from the order denying his motion for reconsideration. (R., pp.92-93.)

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<sup>2</sup> The district court wrote, “The Court’s prior order adequately explains why Gould is not entitled to the relief he requests.” (R., p.90.)

## ISSUE

Did the district court err in denying Mr. Gould's motion for reconsideration?



## ARGUMENT

### The District Court Erred In Denying Mr. Gould's Motion For Reconsideration

In his motion for reconsideration, Mr. Gould stated that he understood the district court was relying on *State v. Wolfe*, 158 Idaho 55 (2015) but asserted that “the court only gives vague and ambiguous references to that case in support of its decision.” (R., p.83.) He also argued that he raised the issue of subject matter jurisdiction in his initial Rule 35(a) motion but “it was never fully and fairly litigated on its merits” and the district court did not hold that *res judicata* applied to his claim. (R., pp.83-84.) Citing to *State v. Flegel*, 151 Idaho 525 (2011) and *State v. Lute*, 150 Idaho 837 (2011), he also argued that an amended indictment was a jurisdictional defect, and such an issue could be raised through a Rule 35(a) motion. (R., pp.85-86.) Finally, he argued that “the evidence that the jury instructions amended the indictment are (sic) clear from the face of the record. One only need to read the jury instruction on Count II of the indictment as compared to the indictment itself.” (R., p.86.)

Whether a sentence is illegal is a question of law, over which appellate courts exercise free review. *State v. Draper*, 151 Idaho 576, 601 (2011). When a district court decides a motion to reconsider, “the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Westby v. Schaefer*, 157 Idaho 616, 621 (2014) citing *Fragnella v. Petrovich*, 153 Idaho 266, 276 (2012). When appellate courts review a motion for reconsideration, they use the “same standard of review the lower court used in deciding the motion for reconsideration.” *Id.* Thus, this Court reviews the district court’s denial of the motion to reconsider *de novo*.

In *State v. Wolfe*, the Idaho Supreme Court reaffirmed that an illegal sentence is “one that is illegal from the face of the record, does not involve significant questions of fact, and does not require an evidentiary hearing.” 158 Idaho at 65 (citing *State v. Clements*, 148 Idaho 82, 86 (2009)). The Court went on to state, “[W]e want to clarify that Rule 35 inquiries must involve only questions of law—they may not include significant factual determinations to resolve the merits of a Rule 35 claim. If a district court does inquire and make significant factual determinations, it exceeds the scope its authority under Rule 35.” *Id.* It noted that *State v. Lute* was “consistent with this precedent” because in that case “it was clear from the face of the judgment that Lute was convicted of something that was not a crime in Idaho, which did not involve a significant question of fact.” *Id.* at 65-66.

The Idaho Supreme Court has also recently held that an improper jury instruction does not implicate a district court’s subject matter jurisdiction. *State v. McIntosh*, 160 Idaho 1, 6 (2016). There, relying on *Lute* and *Flegel*, Ms. McIntosh argued that the district court lost subject matter jurisdiction when it “gave an erroneous lesser-included instruction . . .” *Id.* at 627. The Court held that *Lute* and *Flegel* “turned on the validity of the indictment,” and the district court’s error in giving the instruction “did not remove the trial court’s subject matter jurisdiction.” *Id.* It held that the district court acquired subject matter jurisdiction with the filing of a valid indictment, and “even though the district court erred in giving” an improper instruction, “the district court’s error did not remove the trial court’s subject matter jurisdiction.” *Id.* “Rather, such an instruction is a trial court error that must be objected to and preserved for appeal.” *Id.*

In this case, in his third Rule 35(a) motion, Mr. Gould asserted that Count II of the indictment was constructively amended during the trial by the introduction of evidence of different acts of touching—manual to genital as opposed to manual to buttocks as listed in the indictment. (R., pp.62-63.) Additionally, Mr. Gould asserted that the indictment was constructively amended when the district court gave a jury instruction that removed the manual to buttocks allegation. (R., p.63.) He asserted that, despite the fact that he was acquitted of Count II, the constructive amendment of that count prejudiced him in defending against Count 1. (R., p.65.)

The district court denied the motion. It held that even if Count II had been constructively amended at trial,

Gould has not shown grounds for relief under Rule 35(a). This is so for two reasons. First, Gould lacks a tenable basis for his contention that the alleged constructive amendment deprived the Court of subject-matter jurisdiction over the charges. The supposed charging defect is not one that would qualify as jurisdictional under the analysis the Idaho Court of Appeals undertook the first time Gould challenged his sentence as illegal. See *Gould*, 2015 WL 995141, at \*1-2.<sup>3</sup> Second, relief from an illegal sentence is authorized under Rule 35(a) only if the sentence's illegality can be discerned without resolving significant questions of fact or holding an evidentiary hearing. *E.g.*, *State v. Wolfe*, 158 Idaho 55, 65, 343 P.3d 497, 607 (2015). Gould's argument is that the trial proceedings were infirm as to Count II, prejudicing him in defending against Count I. Whether the alleged defects in the trial proceedings as to Count II actually prejudiced Gould as to Count I is a significant question of fact. Thus, it is not a proper subject for a Rule 35(a) motion.

(R., p.80.)

Mindful of *Wolfe* and *McIntosh*, Mr. Gould asserts that the district court erred when it denied his motion for reconsideration of his third Rule 35(a) motion because

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<sup>3</sup> In Docket No. 42051, the Court of Appeals held that Mr. Gould's claim that the absence of the names of the testifying witnesses on the indictment was not a jurisdictional defect.

the constructive amendment of Count II invalidated the entire indictment. He submits that the issue of whether the constructive amendment of Count II—through the evidence introduced at trial and the erroneous jury instruction—prejudiced him in defending Count I is a question of law. He further asserts that the two bases on which the indictment was constructively amended are clear from the face of the record and could be discerned without resolving significant questions of fact or holding an evidentiary hearing. As such, the district court’s holding to that effect was in error.

#### CONCLUSION

Mr. Gould respectfully requests that this Court vacate his conviction for lewd conduct with a minor under sixteen and remand his case for further proceedings.

DATED this 8<sup>th</sup> day of March, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8<sup>th</sup> day of March, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

BRANDON GRANT GOULD  
INMATE #90834  
ISCC  
PO BOX 70010  
BOISE ID 83707

JASON D SCOTT  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

RPA/eas